Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks	)	WC Docket No. 18-141
Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers	)	WC Docket No. 17-144
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25

REPLY COMMENTS OF USTELECOM – THE BROADBAND ASSOCIATION

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EXECUTIVE SUMMARY

The record assembled by the Federal Communications Commission ("Commission") in the above-captioned proceeding clearly demonstrates the propriety and necessity of granting USTelecom's requested forbearance relief.

Filings responding to the Commission's *April 15 Public Notice* and to data imported from the business data services ("BDS") proceeding further show that nationwide forbearance is warranted. The 2017 *BDS Order* already rightly observed the ubiquity of competition in the BDS transport market; the same factual realities underpinning that decision eliminate any continuing need for an obligation to provide unbundled transport. The Commission's latest data demonstrates not only that incumbent local exchange carriers ("ILECs") face substantial facilities-based competition from cable companies, but also that competitive local exchange carriers ("CLECs") have themselves deployed extensive facilities-based transport networks that either could or already *do* bypass ILEC transport. The same data also confirms that the Commission must forbear from enforcing unbundled network element ("UNE") requirements for loops and avoided-cost resale mandates.

Forbearance opponents, meanwhile, continue to rely on flawed arguments as to both the substantive and procedural aspects of USTelecom's request. The majority of their arguments rely on the claim that individual CLECs might face higher prices for their inputs if the Commission grants forbearance. This assertion misunderstands the relevant test for forbearance, which asks what is best for *competition* and *consumers*, not for specific competitors. In any event, no CLEC has identified any specific markets it would be forced to exit if forbearance were granted. Nor could they – as USTelecom and others have repeatedly made clear, relevant facilities and services will remain available on a commercial basis, even after the extended transition contemplated by the petition. INCOMPAS' arguments further rely on efforts to re-litigate settled Commission precedent on a variety of issues, such as the important role played by cable competition, the disciplining force exerted by even a single competitor in markets such as those at issue here, the likelihood that competitive networks could use splice points to facilitate interconnection with nearby ILEC facilities, and the economic feasibility of running lateral links connecting CLEC and ILEC networks – or of bypassing ILEC networks entirely.

INCOMPAS fares no better on process matters. USTelecom has already disproven INCOMPAS' claim that the petition failed to satisfy the "complete-as-filed" rule. Assertions that USTelecom has somehow made a last-minute change in the requested relief, or that the Commission cannot supplement its own record, are also meritless.

In light of the above, and the remainder of the record, the Commission can and should grant USTelecom's remaining forbearance requests nationwide. At a minimum, the Commission should grant the partial relief outlined in USTelecom's May 6 *ex parte* filing.

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USTelecom – the Broadband Association submits these Reply Comments in response to other parties' filings addressing the Federal Communications Commission's ("Commission's") *April 15 Public Notice*[1] seeking additional input in the above-captioned dockets.

As explained in more detail below, the record establishes that the Commission should grant USTelecom's May 2018 Petition for Forbearance.[2] Opposition to the Petition rests on a fundamental error: The mistaken belief that the Commission's job is to protect particular *competitors*, rather than *competition* and *consumers*. The evidence assembled – both before and after the *April 15 Public Notice* – demonstrates that competition is thriving, and will continue to

[1] *Wireline Competition Bureau Seeks Focused Additional Comments in Business Data Services and USTelecom Forbearance Petition Proceedings and Reopens Secure Data Enclave*, Public Notice, WC Docket Nos. 18-141 *et al.*, DA 19-281 (rel. Apr. 15, 2019) ("*April 15 Public Notice*"). This filing is timely pursuant to the Commission's subsequent extension of the Reply Comment deadline. *Wireline Competition Bureau Extends Reply Comment Deadline et al.*, Public Notice, WC Docket Nos. 18-141 *et al.*, DA 19-421 (rel. May 14, 2019).

[2] Petition for Forbearance of USTelecom – The Broadband Association, WC Docket No. 18-141, (filed May 4, 2018) ("Petition").

do so if the Commission grants USTelecom's petition. In response, opponents rely on a series of one-off outlier cases, contending that some individual competitive local exchange carrier ("CLEC") business models might fail in the face of forbearance. But these claims misunderstand the relevant inquiry. The fact that the vast majority of consumers are served by competitors that do not rely on unbundled network elements or incumbent local exchange carrier ("ILEC")-specific resale mandates demonstrates that such requirements are not critical to competition, and that consumers will continue to enjoy competitive options even if the Commission grants relief. Accordingly, the Commission can and should grant USTelecom's remaining forbearance requests nationwide. At a minimum, it should grant the partial relief outlined in previous USTelecom filings.[3]

I. AS THE COMMENTS MAKE CLEAR, THE RECORD DEMONSTRATES THE PROPRIETY AND NECESSITY OF GRANTING FORBEARANCE.

Throughout this proceeding – including in the latest round of comments responding to the *April Data Tables* – commenters have repeatedly demonstrated that nationwide forbearance from ILEC-specific unbundling and resale obligations is warranted, and that the Section 10 criteria for forbearance[4] have been met.

Filings responding to the *April 15 Public Notice* and to data the Commission imported from the Business Data Services ("BDS") proceeding also confirm that forbearance is warranted.[5] As an initial matter, the Commission found in the 2017 *BDS Order* that competition

[3] *See* Letter from Patrick Halley, Senior Vice President, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed May 6, 2019) ("May 6 *Ex Parte* Letter"); *see also* Letter from Patrick Halley, Senior Vice President, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed May 10, 2019).

[4] *See generally* 47 U.S.C. § 160(a).

[5] *April 15 Public Notice* at 1 ("The Bureau seeks focused public comment on the extent to which the April Data Tables inform the extent of competition and competitive pressure in the market

in the business data service transport market was ubiquitous.[6] As CenturyLink notes, the Commission's 2015 Data Collection "confirmed that price cap carriers' business data services, *including interoffice transport* and DS1 and DS3 end user channel terminations, were subject to substantial competition in 2013, even without fully accounting for cable providers' dramatic growth in enterprise services."[7] Even six years ago (in 2013), "[c]ompetitors had deployed competing transport networks to 95% of census blocks with BDS demand, collectively containing 99% of business locations."[8] If anything, competition in the transport market "has only accelerated" since the 2013 data collection,[9] as market forces and the Commission's pro-deployment regulatory framework have driven still more infrastructure investment.

The Commission can and should reject suggestions that the *BDS Order*'s findings are somehow irrelevant to USTelecom's petition. First, the Commission has already explained that "the facilities used to provide TDM transport services are identical to the facilities that ILECs

for lower speed (DS3 and below) time division multiplexing (TDM) transport services in price cap areas.").

[6] *See Business Data Services in an Internet Protocol Environment et al.*, Report and Order, 32 FCC Rcd 3459, 3499 ¶ 85 (2017) ("*BDS Order*"). In reviewing the *BDS Order*'s conclusions, the Eighth Circuit did not disturb the Commission's finding that the transport market was competitive nationwide – it merely found that the agency had not provided sufficient notice that it might remove *ex ante* price regulation for all TDM transport, and remanded on that issue alone. *See generally Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991 (8th Cir. 2018); *see also id.* at 997 (remanding only "regarding notice" and "deny[ing] … petitions in all other respects").

[7] Comments of CenturyLink, WC Docket Nos. 18-141 *et al.*, at 5 (filed May 9, 2019) ("CenturyLink") (emphasis added).

[8] *Id*.

[9] CenturyLink at 5.

use to provide transport UNEs."[10] As such, "the Commission's finding of 'substantial competition' for TDM transport services applies equally with respect to transport UNEs."[11] Moreover, the factors that render transport suitable for competitive entry in the BDS context also obviate the need for unbundled transport. As the Commission has already explained, "transport services represent the 'low-hanging fruit' of the [BDS] circuit, which makes it particularly attractive to new entrants"[12] The functionality of a transport link is the same whether it is purchased via a commercial arrangement or tariff as BDS, on the one hand, or via an interconnection agreement as a UNE, on the other. As one CLEC, Bandwidth, acknowledged in this proceeding: "[I]n the cases of DS1 loops, DS1 EELs, and DS3 loops, Special Access/BDS (before adding Internet access or other services on top) does offer direct, technically identical substitute services."[13] Accordingly, the Commission's factual findings regarding TDM transport are equally applicable to transport UNEs.[14] Similarly, nationwide forbearance from dark fiber transport UNEs is necessary and proper, for "where competitive deployment justifies the

[10] *BDS Order* ¶ 77; *see also* Comments of AT&T, WC Docket Nos. 18-141 *et al.*, at 6 (filed May 9, 2019) ("AT&T") ("There is no physical difference between the facilities used for BDS transport and UNE transport."); Comments of Verizon, WC Docket No. 18-141, at 4-11 (filed May 9, 2019) ("Verizon").

[11] Verizon at 5.

[12] *BDS Order* ¶ 77.

[13] Reply Comments of Raw Bandwidth Telecom, Inc. and Raw Bandwidth Communications, Inc., WC Docket No. 18-141, at 7 (filed Sept. 5, 2018).

[14] Verizon at 5-6; *see also* Comments of Frontier Communications Corporation, WC Docket No. 18-141 *et al.*, at 4 (filed May 9, 2019) (explaining how "[t]he Commission's findings with respect to BDS transport apply with equal force to UNE transport").

removal of transport UNEs that include electronics it likewise justifies the removal of dark fiber UNEs that do not include electronics."[15]

Additionally, newly available data set out in the *April Data Tables* and latest Form 477 collection – drivers of this latest narrow round of comments at the Commission's request[16] – further prove that nationwide relief from transport unbundling is appropriate.[17] As AT&T explains, the "Form 477 data show that ILECs face nearly ubiquitous facilities-based competition from cable companies," and this data point alone is "more than sufficient … to support nationwide elimination of UNE transport requirements."[18] Indeed, as Frontier notes, we now "have confirmation that not only are over 90 [percent] of buildings within a half mile of competitive transport," but in fact "over 90 [percent] of the population are in census blocks where cable provides 25/3 Mbps."[19] Similarly, the *April Data Tables* provide further evidence of competition, demonstrating that "CLECs have also deployed extensive facilities-based transport networks that already bypass or could readily bypass the ILECs' transport elements."[20] In CenturyLink's words, this is "especially the case given that the [*April Data Tables*] dramatically

[15] Verizon at 15-16 (also noting that "Verizon both uses and sells a *de minimis* amount of dark fiber UNEs"); *see also* Letter from Patrick Halley, Senior Vice President, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141, at 4 (filed May 24, 2019).

[16] *See generally April 15 Public Notice* at 1.

[17] AT&T at 5-9; CenturyLink at 9-10.

[18] AT&T at 7-8.

[19] Frontier at 4.

[20] AT&T at 9.

understate competition," because "competitors frequently bypass ILEC networks entirely, eliminating the need for them to connect to ILEC wire centers."[21]

While the Commission's *April 15 Public Notice* focused on transport, the newly available data also confirms that the Commission should forbear from UNE requirements for DS0 loops and avoided-cost resale on a nationwide basis.[22] The Form 477 data in particular highlights the virtual ubiquity of cable service at 25 Mbps/3 Mbps. Such offerings provide robust competition in the provision of residential voice and broadband offerings, and consumers have flocked to these cable alternatives. Under these circumstances, there is no rationale for continuing to saddle ILECs with unbundling and resale mandates that do not apply to their successful market rivals.

Ultimately, then, the record compiled in response to the *April 15 Public Notice*, like the record in this docket before that request for comment, confirms what USTelecom has argued

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[21] CenturyLink at 9-10. USTelecom has suggested that the Commission should at least lift transport unbundling mandates where competitors are able to duplicate or bypass ILEC transport, such as on routes connecting any Tier 1 or 2 wire center to any other such wire center. *See* May 6 *Ex Parte* Letter at 2-3, 11-12. Such wire centers, by definition, contain at least 3 fiber-based collocators, at least 24,000 business lines, or both. *See* 47 C.F.R. § 51.319(d)(3). As the Commission explained in the *Triennial Review Remand Order*, "[a] threshold of three fiber-based collocators establishes that multiple carriers have overcome the costs of deployment in a wire center, signifying that substantial revenues exist in the wire center to justify deployment," and the presence of at least 24,000 business lines "signal[s] that sufficient revenue opportunities are very likely to exist in such wire centers to justify the provision of competitive transport." *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533, 2601 ¶¶ 118 (2005) (*"TRRO*"). Moreover, while the 2005 *TRRO* established divergent tests for unbundling of DS1 and DS3 transport links, the 2017 *BDS Order* recognized that a unified test is appropriate today, given the evidence of strong competition throughout the TDM transport market. *See, e.g.*, *BDS Order* ¶¶ 77-82, 85. USTelecom emphasizes that this alternative approach is almost surely too conservative given new record data, which reflects high levels of competition even in ILECs' Tier 3 wire center footprints; for instance, "within AT&T's Tier 3 wire center footprint, about 90 percent of the population and households in census blocks where cable has deployed 25 Mbps or higher broadband service." AT&T at 8.

[22] AT&T at 13-17.

from the start: The dramatic rise of competition, and ILECs' drastic loss of market share, render UNE requirements unnecessary and inimical to further market advance, warranting nationwide relief.[23] At a minimum, the Commission should grant partial relief consistent with USTelecom's May 6 *Ex Parte* Letter.[24]

II. CLEC CLAIMS ARE WRONG AS TO BOTH THE SUBSTANTIVE AND PROCEDURAL ISSUES PRESENTED.

Whereas Petition supporters have demonstrated that relief is appropriate and warranted under the Section 10 forbearance criteria, opponents' arguments as to both substantive and procedural matters fail.

A. INCOMPAS Continues to Misconstrue the Relevant Forbearance Test.

Many of INCOMPAS's substantive arguments at their core boil down to the assertion that, if the Commission grants forbearance, a particular CLEC might pay more for its inputs than it does today.[25] Setting aside whether this speculative claim is correct, it does not address the relevant inquiry. The Commission must consider here what is best for *competition* and *consumers* – not what is best for individual *competitors*.[26] The Commission itself has explained that "preserving [specific entities'] market positions … at the expense of allowing freedom of pricing, supply and entry is not … an appropriate way to foster competition when better

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[23] CenturyLink at 5-8; *see also* Frontier at 4 ("While at the time of the 1996 Act and the adoption of UNE obligations incumbent LECs had virtually 100% market share, the number of U.S. households subscribing to an incumbent LEC voice line is projected to fall close to 10% by year-end 2018.").

[24] *See, e.g.*, CenturyLink at 5 n.11; Verizon at 3, 12-15.

[25] *See generally* Comments of INCOMPAS, WC Docket Nos. 18-141 *et al.* (filed May 9, 2019) ("INCOMPAS").

[26] *Cf.* Petition at 4-7, 24-33 (explaining the history of the statutory mandates in question, and the need for and appropriateness of forbearance).

alternatives exist."[27] As described by a range of commenters in this proceeding, including those highlighted in Section I, *supra*, the data show that retail competition is robust and virtually ubiquitous within the markets at issue here, meaning that consumers will continue to have retail alternatives available to them. Nor is there reason to believe that CLECs will lose access to relevant network facilities or services simply because the Commission eliminates outdated, market-distorting mandates. Rather, CLECs will retain the ability to purchase replacements or alternates for the elements or arrangements they currently obtain as UNEs on commercial terms, and to provide service to customers using those inputs, just as they do today. Moreover, USTelecom has proposed a reasonable transition period to facilitate the migration from unbundled elements to commercially procured inputs, further ensuring that efficient CLECs will remain able to transition and compete after grant of the Petition.[28]

It is telling, in this regard, that no CLEC has identified specific markets it would be forced to exit following grant of forbearance. It appears that the CLECs' real complaint is not that *consumers* will be harmed by the elimination of competitors in any geographic or product market, but rather that *CLECs themselves* might incur higher costs if forced to pay market-based rates for their inputs. The unbundling regime is not meant to guard CLEC profits; it is only meant to facilitate the introduction of competition.[29] And as the Commission and the courts have

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[27] *Regulation of International Accounting Rates*, Fourth Report and Order, 11 FCC Rcd 20063, 20069 ¶ 14 (1996).

[28] USTelecom's proposed 18-month transition is reasonable and consistent with prior Commission actions. For example, the TRRO included a transition plan of 12 months for DS1 and DS3 loops and transport and circuit switching, and 18 months for dark fiber loops and transport. *See TRRO* ¶¶ 5, 142 (transport); *id.* ¶ 195 (loops); *id.* ¶ 226 (switching).

[29] *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part); *see also* Petition at 5-6 (discussing statements from Senator John Breaux regarding role played by unbundling and relevant Commission precedent).

made clear, unbundling's costs are too high to allow for continued use of UNEs after that competition arrives.[30] Even if a particular CLEC would be unable to compete absent UNEs (a hypothetical that finds no support in the record), that is not relevant to the Commission's inquiry so long as *other* competitive retail alternatives remained in place and continued to discipline the market. The Commission long ago made clear that unbundling was not meant to prop up specific carriers whose business models could not succeed absent UNEs, so long as reasonably efficient providers could do so.[31] The record overwhelming shows that such alternatives would remain available, because only a miniscule proportion of competitive offerings rely on UNEs in the first place. In short, any claim that UNEs are essential to competition (as opposed to the needs of particular competitors) is belied by the fact that over 95 percent of competitive

[30] Petition at 5-7 nn.13-18 (detailing Commission and court precedent); *see also, e.g.*, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Red 19415, 19417 ¶ 3 (2005); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, 3704 ¶ 14 (1999); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 561 (D.C. Cir. 2004); *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002); Declaration of Glenn Woroch and Robert Calzaretta, WC Docket No. 18-141, at 2-3 (attached to USTelecom's May 6 *Ex Parte* Letter) ("May 6 Economists Decl.") ("Absent relief from these now obsolete requirements, the Commission would be leaving in place price regulations that are no longer needed to serve their intended purpose but risk distorting market forces governing these services. By retaining these requirements, the Commission increases the likelihood that consumers will suffer the harms associated with slower ILEC investment in next-generation services and distorted entry and investment incentives of competitors that are favored by these rules.").

[31] *TRRO* ¶ 27 (explaining the Commission's "reasonably efficient competitor" standard and "reject[ing] arguments that support unbundling based on the costs associated with a particular architecture or approach – even an architecture or approach employed by the incumbent LEC – where entry using a more efficient available technology would permit economic entry").

connections do not rely on UNEs at all.[32] Competition without UNEs is not only *possible* – it is the overwhelming norm.

INCOMPAS attempts to portray the data on which the *April 15 Public Notice* sought comment as demonstrating a dearth of competition, but its arguments rely on specious premises. For example, INCOMPAS's assertion that "the proximity of cable facilities to wire centers says nothing about the likelihood of competitive entry"[33] is wrong, as it relies on the assumption that cable plays no role in disciplining the market for the services at issue here. As the Commission has recognized, cable offerings exert significant competitive force, particularly in connection with DS0- and DS1-level services. In fact, "cable providers' market share of lower speed business data services continues to grow significantly[.]"[34] To this end, cable companies have *already* deployed networks covering a large portion of BDS demand.[35] And the data show that cable networks provide nearly ubiquitous service to residential locations,[36] refuting any claim that UNEs are needed to provide service to residential customers. Petition opponents imply that

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[32] *See, e.g.*, Petition at 16-17 (noting that, according to Commission data for year-end 2016, non-ILECs used UNE loops to provision less than four percent of non-ILEC end-user switched access lines and interconnected VoIP lines).

[33] INCOMPAS at 4.

[34] *Business Data Services for Rate-of-Return Local Exchange Carriers et al.*, Report and Order, Second Further Notice of Proposed Rulemaking, and Further Notice of Proposed Rulemaking, 33 FCC Rcd 10403, 10456 ¶ 154 (2018) ("*2018 BDS FNPRM*") (emphasis added).

[35] *Id.* ("[C]able providers' market share of lower speed business data services continues to grow significantly," and "cable operators self-provision all aspects of their BDS, *including transport functionality"* (emphasis added)).

[36] May 6 Economists. Decl. at 1 ("using the Form 477 data that the [Commission] released in December 2018, we calculated the portion of the U.S. population and households covered by broadband services offered by cable companies … [w]e found that cable operators deployed wireline broadband facilities in census blocks covering about 90 percent of the U.S. population and about 90 percent of U.S. households").

unbundling is necessary to facilitate competition by wireline CLECs notwithstanding cable's success, but the Commission has "explicitly reject[ed] arguments that support unbundling … where entry using a more efficient available technology" is feasible.[37] Cable's growing market position demonstrates that UNEs are not necessary for preserving competition – only for preserving the business models of specific competitors.

Similarly, INCOMPAS's claim that "cable will [not] build out to ILEC end offices in order to provide interoffice transport"[38] ignores the prevalence of cable bypass. Cable operators, that is, generally "*self-provision* all aspects of their BDS, *including transport functionality*[.]"[39] INCOMPAS's argument also ignores the fact that CLECs can interconnect with cable networks at other locations, such as neutral carrier hotels; the suggestion that only an ILEC central office is suitable for interconnection is baseless.

In other cases, INCOMPAS simply attempts to relitigate settled aspects of the Commission's competition policies. For example, INCOMPAS's claim that "over half of the verified wire centers have no more than one competitive provider with fiber within a half-mile"[40] is highly misleading, even aside from its attempt to write cable out of the analysis. The Commission held in the *BDS Order* that one non-ILEC competitor is sufficient to discipline the market for services such as those at issue here,[41] and the Eighth Circuit affirmed this conclusion

[37] *TRRO* ¶ 27.

[38] INCOMPAS at 3.

[39] *2018 BDS FNPRM* ¶ 154 (emphasis added).

[40] INCOMPAS at 3.

[41] *BDS Order* ¶ 15 ("even a single competitor exerts competitive pressure which results in just and reasonable rates").

as reasonable.[42] By focusing on locations with "no more than one" non-ILEC competitor, INCOMPAS conflates the extremely low number of wire centers with *no* competitive providers within a half-mile with the far greater number that *do* have one competitive provider nearby.[43] The Commission should decline INCOMPAS's invitation to repudiate its settled precedent in this area. Likewise, to the extent INCOMPAS suggests that a half-mile is too long for competitors to run laterals to connect with other networks, that claim is contradicted by the Commission's findings in the *BDS Order*, which – once again – the Eighth Circuit affirmed. And INCOMPAS's claim that only ILECs can aggregate enough traffic to warrant deployment of transport facilities is utterly incompatible with the burgeoning marketplace for super-high-capacity Ethernet transport, as well as cable's success in deploying to markets nationwide.

INCOMPAS's suggestion that the *April Data Tables* overstate competition because they do not consider distance to CLEC splice points is also meritless and contrary to precedent. First, the *April Data Tables* reveal distances from ILEC wire centers to buildings with CLEC facilities – *i.e.*, to *de facto* points of interconnection with CLEC networks. The vast majority of ILEC wire centers are extremely close to CLEC fiber, buildings with CLEC facilities, or both. Second, the suggestion that a CLEC would construct fiber that passes an ILEC wire center but would neglect to place a splice point allowing for connection to that wire center defies credulity. As the *BDS Order* concluded, CLECs entering a market "consider nearby demand and build circuitous routes … and … place spare splice points along their network routes to accommodate future

[42] *See generally Citizens*, 901 F.3d at 997 (remanding only "regarding notice" and "deny[ing] … petitions in all other respects").

[43] *See* INCOMPAS at 3 (claiming that "nearly a quarter" of ILEC wire centers "are not located within a half-mile of any competitive fiber facility").

demand."[44] Any other approach would be irrational. It is not the Commission's job to protect CLECs from their own poor network design, or to saddle consumers and market actors with the costs of outdated regulation simply to make up for competitors' mistakes.

While INCOMPAS holds Section 251(c) unbundling forth as the "bridge to broadband,"[45] making claims as to "Congress's intent behind Section 251(c)," its arguments do not hold water. As USTelecom has detailed, competition has arrived – over cable, over fiber, over spectrum, and otherwise. CLECs have had twenty-three years to build bridges to fiber. Unlike cable competitors, which have invested capital and deployed facilities, many CLECs – including those opposing the Petition – have chosen to forego the risks and costs associated with deployment, relying instead on the safety of highly-discounted UNEs. As the Petition explained at length, neither Congress, the courts, nor the Commission ever expected unbundling to endure after competition had arrived.[46]

B. INCOMPAS's Procedural Arguments Are Meritless.

Opponents also misconstrue both the nature of USTelecom's request for nationwide forbearance and USTelecom's May 6, 2019 *ex parte*.

As a preliminary matter, USTelecom has already disproven INCOMPAS's assertion[47] that the initial Petition failed to satisfy the Commission's "complete-as-filed" rule.[48] As USTelecom previously demonstrated, the Petition satisfied the 2009 *Forbearance Procedures*

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[44] *BDS Order* at ¶ 54.

[45] INCOMPAS at 6.

[46] *See, e.g.*, Petition at 4-7, 28 n.83.

[47] INCOMPAS at 5, 16-17.

[48] *See generally* May 6 *Ex Parte* Letter at 14-15.

Order's *prima facie* case requirement by "show[ing] in detail how each of the statutory criteria [for forbearance] are met" and presenting "facts and arguments which, if true, are sufficient" to warrant forbearance."[49] Given the extensive data and argument presented in the Petition in support of USTelecom's requests, arguments as to the Petition's completeness can and must be dismissed.[50]

Nor has USTelecom made a "last-minute change in the requested relief" it sought in its forbearance request.[51] Quite the opposite: USTelecom's May 6, 2019, filing repeatedly argues that "[t]he data in the record … supports nationwide relief,"[52] only noting the Commission's *option* of crafting lesser relief as an alternative solution. The suggestion that the Commission is limited to granting all relief originally requested or none at all would drain agency resources and deprive the Commission of the ability to craft the regime it deemed most appropriate. As USTelecom has explained, "if INCOMPAS's arguments [on this point] were given credence, the effect would be that any forbearance opponent could stymie any petition simply by asserting that relief should be considered at a different level of geographic granularity than was reflected by the original request."[53] There is no basis in law or policy for this approach.

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[49] *Id.* at 14; *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd 9543, 9553 ¶ 17 (2009) ("*Forbearance Procedures Order*"); *see also* 47 C.F.R. § 1.54(b).

[50] May 6 *Ex Parte* Letter at 14-15.

[51] INCOMPAS at 4.

[52] *See, e.g.*, May 6 *Ex Parte* Letter at 1, 3-4, 7-14.

[53] *Id.* at 14-15.

INCOMPAS's arguments as to the Wireline Competition Bureau's ("Bureau's") inclusion of data from the BDS proceeding in Docket No. 18-141 are similarly flawed. As a preliminary matter, the *Forbearance Procedures Order* only addresses the supplementation of records by *parties*[54] – nowhere did the Commission purport to limit its own inherent power, either on its own or via its Bureaus and Offices, to develop records, including via *sua sponte* supplementation. Notably, INCOMPAS presents no support for its contention that the Commission was somehow powerless to supplement its record. Indeed, as USTelecom has previously noted, the Commission's rules expressly contemplate submission of additional information *from parties* "[b]y permission of the Commission," and afford the agency the sole discretion authority to make that determination.[55] Hence, the rules stemming from the *Forbearance Procedures Order* make clear that a "petitioner may submit substantively new material, including new information, data, studies, or arguments, at the request of the Commission."[56] Here, the Commission *itself* (via the Bureau) has incorporated the entire record of the BDS proceeding and the entire *2015 Data Collection* into this proceeding, and sought further comment on USTelecom's Petition in light of those materials. It would be chimerical to suggest that the Commission may permit additions to the record, but may not make such additions itself, particularly when the Commission has nowhere abrogated its power to do so.

In any event, as USTelecom has stated, it made clear from the day the Petition was filed that various data sources, including the Commission's publicly available Form 477 data and the

[54] *Cf., e.g.*, *Forbearance Procedures Order* ¶ 15.

[55] 47 C.F.R. § 1.54(f)(2).

[56] *Id.* § 1.54(f)(1).

public record in the BDS proceeding, were relevant to its claims.[57] Indeed, INCOMPAS itself has extensively relied on Form 477 data in this proceeding to advance its own arguments, as have its members and other Petition opponents.[58] As such, no party can claim any unfairness stemming from the introduction of related data into the record here. The Commission should reject INCOMPAS's attempt to distract it from the most current marketplace data available.

III. CONCLUSION

For the forgoing reasons, and as the record demonstrates, the Commission should grant the aspects of USTelecom's Petition on which it has not yet ruled, and forbear from enforcing onerous legacy rules that no longer have a place in the modern U.S. communications marketplace.

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[57] *See, e.g.*, Petition Attachment B at 12 (relying on public data from the business data services proceeding); Petition at 11-12 (same).

[58] *See generally, e.g.*, Letter from Karen Reidy, Vice President, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed Mar. 4, 2019); Letter from Larry G. Antonellis, Director, Granite Telecommunications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed Nov. 8, 2018); Letter from Jose Perez Diaz, Administrator, WorldNet Telecommunications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed Oct. 19, 2018); Comments of INCOMPAS, GN Docket No. 18-238, filed Aug. 17, 2018 (cross-filed by INCOMPAS in the instant docket); Reply Comments of CALTEL, WC Docket No. 18-141 (filed Sept. 5, 2018); Reply Comments of Raw Bandwidth Telecom, Inc. et al., WC Docket No. 18-141 (filed Sept. 5, 2018); Reply Comments of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., WC Docket No. 18-141 (filed Sept. 5, 2018); Comments of INCOMPAS, WC Docket No. 18-141 (filed Aug. 17, 2018); Comments of ICG CLEC Coalition, WC Docket No. 18-141 (filed Aug. 7, 2018); Opposition of Public Knowledge et al., WC Docket No. 18-141 (filed Aug. 6, 2018); Opposition of First Communications, LLC, WC Docket No 18-141 (filed Aug. 6, 2018); Opposition of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., WC Docket No. 18-141 (filed Aug. 6, 2018); Motion for Partial Summary Denial and Comments of Cox Communications, Inc. (filed Aug. 6, 2018); Comments of the California Public Utilities Commission, WC Docket No. 18-141 (filed Aug. 6, 2018); Opposition of INCOMPAS et al., WC Docket No. 18-141 (filed Aug. 6, 2018); Comments of the Center for Democracy and Technology, WC Docket No. 18-141 (filed Aug. 6, 2018).

Respectfully submitted,

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